

ENVIRONMENTAL LAW AND REGULATION

PART I: INTRODUCTION

A.COMPLEXITY OF ENVIRONMENTAL PROBLEMS

1. Environmental issues are very complex and a single incident may have wide impact and give rise to a number of different liabilities.

2. Example : the Buncefield fire

<http://news.bbc.co.uk/1/hi/uk/4525504.stm>

- Air pollution
- 26 million litres of stored contaminated water used to fight the blaze
- Contamination of ground water
- Contamination of soil
- Total loss of the depot and jobs
- Damage to neighbouring property and businesses
- Some health impacts

3. Environmental incidents are polycentric in their effects.

- the operators of the oil depot
- the other occupiers of premises on the site
- land users and businesses in the vicinity
- local residents
- the emergency services,
- pollution control agencies

4. Environmental law is an area where conflicts of values can be very evident.

"How one views pollution, and what level of it one should tolerate, depends upon what one wants to do with the environment, and in the event of conflict between groups and interpretations, then rightness becomes a practical matter of power and political persuasion."

Gunningham, *"Pollution, Social Interest and the Law"* (1974)

PART II: SOURCES OF ENVIRONMENTAL LAW

A. UK LEGISLATION

1. Statutes

Most modern UK environmental law is found in statutes such as

- Environmental Protection Act 1990
- Pollution Prevention and Control Act 1999
- Water Resources Act 1991
- Environment Act 1995

2. Delegated legislation

(a) The Pollution Prevention and Control Act 1999 gave the Secretary of State wide ranging powers to make delegated legislation for the regulation of polluting activities. Acting under this Act the Secretary of State has passed the Environmental Permitting Regulations 2010 which provide for the environmental permitting regime, which is now the principle regulatory mechanism for controlling polluting activities.

(b) Regulations deal with such matters as

- Definitions
- Procedural requirements
- Setting of environmental

3. Central government policy statements

1. The interpretation and application of environmental law is greatly influenced by central government policy, in particular

- Statutory Guidance Papers
- Government Circulars

2. These policy statements certainly give the potential for considerable political control over the interpretation and application of environmental law, particularly through the statutory appeal system.

B. EUROPEAN UNION LAW

1. Environmental Directives

EU law is most commonly passed in the form of Directives. These are binding on member states and must be incorporated into national law.

PART III. ENVIRONMENTAL LAW PRINCIPLES

Environmental law is based on four main principles:

- Preventative principle
- Precautionary principle
- Proximity principle – rectification at source
- Polluter pays principle

PART III. LEGAL MECHANISMS FOR PREVENTING ENVIRONMENTAL DAMAGE

A. INTRODUCTION

1. There is a large number of different legal mechanisms that can be used to secure the aim of environmental protection. The traditional method of control has been through a system of regulation but today the legal mechanisms which can be used include the use of a number of 'market mechanisms'.

2. Non-legal preventative mechanisms

(a) Environmental management systems

Effective environmental management can reduce the impact of industrial operations on the environment, but to be effective they need to be based on external accreditation

- the international standard - ISO 14001
- the EU standard - EMAS under EC Regulation 1836/93.

(b) Education initiatives

(c) Self regulation and Codes of Practice

B. REGULATORY CONTROLS

1. Aims of regulatory control

To prevent or limit environmental harm by preventing, minimising or rendering harmless emissions to the environment and controlling other potential environmental impacts such as waste generation and energy use.

2. The use of environmental standards

The amount of 'acceptable' pollution is laid down in environmental standards. These fall into four main groups:

- 'Technical standards
- Emissions standards
- Environmental quality standards
- Product standards

3. Controls during operations – licensing/permits

- A licence must be obtained before operations begin
- The regulator can refuse the permit if the regulator does not think the process or activity can be operated safely
- The regulator can refuse the permit if it does not consider that the applicant will be able to operate the process safely
- The regulator can attach conditions limiting the operation of the process or activity
- The regulator can impose sanctions if operations are carried out without a permit or in breach of permit conditions.

4. After operations cease – safe de-commissioning

Modern regulatory systems include a requirement that there is safe de-commissioning of a site after operations cease. These de-commissioning and aftercare provisions are also part of the preventative approach.

D. THE USE OF ECONOMIC INSTRUMENTS TO PREVENT OR LIMIT POLLUTION

1. Environmental taxation

A number of taxes are imposed on polluting activities – but perhaps the most important are:

- the landfill levy
- The climate change levy

2. EU Emissions Trading Scheme

(a) The current emissions trading scheme relates to six greenhouse gases, but is principally used in relation to the trading of carbon emissions

(b) Member states must develop a National Allocation Plan (NAP) setting a cap on the total emissions allowed. Member states then allocate allowances to the installations subject to the trading scheme – i.e. installations are those which have heavy energy use – such as the iron and steel.

(c) Installations to monitor and report their emissions. They may use all or part of their allocation and have the flexibility to buy additional allowances or to sell any surplus allowances generated from reducing their emissions below their allocation.

3. Deposit and refund schemes

These are far more prevalent in continental Europe and the USA (particularly in California) than they are in the UK.

Commission v Denmark (the Danish Bottles case) [1988] ECR 4607

ENVIRONMENTAL LAW: DUTIES AND LIABILITIES

PART I. PREVENTION: ENVIRONMENTAL PERMITTING

1. Who needs an environmental permit?

(a) Under regulation 12 of the EPR 2010, **anyone who operates a “regulated facility” as defined in Schedule 1 of the Environmental Permitting Regulations 2010 MUST obtain an environmental permit from the Environment Agency or the local authority BEFORE commencing operations.**

(b) Regulated facilities fall into the following groups:

- **Energy**
- **Metals**
- **Minerals**
- **Chemicals**
- **Waste management.**
- **Other (e.g. paper, pulp & board manufacture; carbon; tar & bitumen; dyestuffs; timber; rubber; food industries; intensive farming)**
- Radioactive substances activities
- Discharges of poisonous, noxious or polluting matter, waste matter, or any trade effluent or sewage effluent to water
- Discharge of sewage effluent into the sea or surface waters

(c) Exempt operations

Schedule 3 of the Environmental Permitting Regulations 2010 exempts a number of waste treatment and recycling operations from the requirement to obtain a permit – subject to limits on the amount of waste kept at any one time and the manner in which it is kept.

It also exempts small discharges of treated sewerage effluent from domestic premises and small discharges of substances to ground water for scientific purposes – e.g. tracer tests

2. Who grants the environmental permit?

Regulated facilities are divided into three groups

- **Part A(1) controlled by the Environment Agency.**
- Part A(2) facilities regulated by the local authority
- **Part B facilities** regulated by the LA.

3. Types of environmental permit

(a) Bespoke permits

These apply to the more seriously polluting activities and to complex installations where a number of different activities are being carried out together on the same set of premises – e.g. power stations, chemical works, landfill sites and waste incinerators.

(b) Standard permits

The 2010 Regulations allow the Environment Agency or the local authority to make standard rules which will apply to all operators of a some types of facility.

Currently standard permits are available for a range of waste management activities. For each of these activities the standard rules provide

- The quantities and types of waste which may be held
- How the waste is to be stored and treated
- How far the site must be from other sensitive sites like housing or sites of special scientific interest

The applicant must accept ALL the standard conditions and has no right to appeal against them

4. Operator competence

(a) Although there is a legal requirement that the regulator be satisfied the operator is competent, the regulations do not lay down any criteria for making the decision as to whether or not the applicant is competent. The relevant criteria are set out in Government policy guidance: see

- Chapter 9 of the Core Guidance (which applies to Part A1 facilities)
- Chapter 11 of the General Guidance Manual (for A2 and B facilities).

(b) The regulator must only grant a permit to an operator who is considered to be competent to operate that facility, having regard to:

- Whether the operator's management system is adequate
- Whether the operator's technical competence is adequate
- The operator's previous record of compliance with regulatory requirements
- Whether the operator has sufficient funds to meet current requirements and the long term costs of decommissioning

5. Safe decommissioning

(a) In the case of the lower risk activities – Part A2 and Part B premises, all that is required is that the operator gives the local authority 20 days notice of his intention to cease the activities.

(b) In the case of Part A facilities the Environment Agency will only accept surrender of the permit if it is satisfied that the necessary measures have been taken—

- to avoid a pollution risk resulting from the operation of the regulated facility; and
- to return the site of the regulated facility to a satisfactory state, having regard to the state of the site before the facility was put into operation.

2. WASTE DUTY OF CARE

(a) This duty under section 34 of the Environmental Protection Act 1990 is imposed on any person who imports, produces, carries, keeps, treats or disposes of controlled waste. It applies to ALL holders of waste, INCLUDING those who are exempt from environmental permitting regime.

(b) Failure to observe the statutory duty of care is a criminal offence.

(c) The duty is defined in s34 as a duty to take all those measures which are

- applicable to that person in his capacity in relation to the waste, and
- reasonable in the circumstances

to achieve the statutory objectives of the duty of care. These are:

- to prevent waste management offences being committed by any person over whom the holder has control
- to prevent the escape of waste from the control of the holder or any other person over whom the holder has control
- on the transfer of waste to ensure that waste is transferred only to an authorised person, and that sufficient written description of the waste is given

(d) A Code of Practice has been issued by the Secretary of State under s34(7), which gives guidance on the things that should be done by a holder of waste to meet this duty of care..

The requirements of the Code of Practice will be taken into account if a holder is prosecuted for failure to meet the duty of care.

PART II. REGULATORY LIABILITY

1. Where there has been a breach of the environmental permitting system the operator of an installation may find that he is served with one of a number of notices by the Environment Agency or the local authority.

2. All these notices are discretionary – the regulator may serve a notice if it feels that the situation warrants such action.

3. Environmental permitting

(a) Enforcement notices: regulation 36

An enforcement notice maybe served when the regulator considers that an operator is in breach of a permit condition, or is likely to be in breach of a condition in the permit
An enforcement notice may require the operator to take steps to

- comply with the condition
- to remedy the effects of pollution caused by the contravention.

(b) Suspension notices: regulation 37

The regulator may serve a suspension notice if it considers that the operation of the facility involves a risk of serious pollution. The notice must specify what the risk of serious pollution is, and the steps to be taken to remedy the situation

(c) Remedial action by the regulator: **regulation 57:**

If the regulator considers that the operation of a regulated facility under an environmental permit involves a risk of serious pollution, or the commission of an offence under regulation 38(1), (2) or (3) causes pollution, or the regulator suspects that an offence under that regulation is being or has been committed and that pollution is being or has been caused as a result. the regulator may arrange for steps to be taken to remove that risk, after giving the operator 5 days notice. The regulator may recover the cost of taking all NECESSARY action from the operator (57(4))

4. Statutory nuisance

(a) Statutory nuisance are defined in section 79(1) Environmental Protection Act 1990 and include

- smoke emitted from premises so as to be prejudicial to health or a nuisance
- fumes or gases emitted from premises so as to be prejudicial to health or a nuisance
- dust, steam, smell or other effluvia arising on industrial, trade or business premises, and being prejudicial to health or a nuisance
- any accumulation or deposit which is prejudicial to health or a nuisance
- noise emitted from premises so as to be prejudicial to health or a nuisance

(b) Where the local authority is satisfied that a nuisance exists, or is likely to occur, or to recur, the authority must serve an abatement notice under section 80. The notice is served on the person responsible for the nuisance. The abatement notice may require

- the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence
- the execution of such work or taking of steps necessary to achieve this

PART III. CRIMINAL LIABILITY

1. Regulatory offences

(a) Under Regulation 38 of the Environmental Permitting Regulations 2010, it is a criminal offence :

- to fail to obtain a permit
- to fail to comply with a permit condition
- to fail to comply with the requirements of an enforcement notice or suspension notice
- to obstruct a regulator in the course of their work or to give false evidence to the regulator

(b) Under section 80 of the Environmental Protection Act 1990 it is an offence to fail to comply with the abatement notice

2. Environmental offences

These include

- causing or knowingly permitting poisonous noxious or polluting matter to enter surface or underground waters (Environmental Permitting Regulations 2010)
- causing the deposit of waste in a manner which damages the environment or harms human health (Section 33 Environmental Protection Act 1990)
- being in breach of the statutory duty of care in relation to waste (section 34 Environmental Protection Act 1990))

3. Meaning of 'cause'

A person or company will be liable for causing pollution if he carries out an active operation which results in that pollution unless some extraordinary event intervenes:

Alphacell v Woodward [1972] AC 824; 2 All ER 475; 2 WLR 1320

CPC (UK) Ltd v NRA [1995] Env LR 131

Empress Car Company v NRA (now the EA) [1998] Env LR 396

4. Who can be liable?

- (a) The individual who committed the offence
- (b) The company which employed an individual who committed an offence in the course of his employment
- (c) Personal liability may be imposed on directors and senior managers who have consented to, or connived at an offence, or where the offence is due to their negligence.

“Where an offence under any provision of this Act committed by a body corporate has proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate ...he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly”.

- Regulation 41 of the Environmental Permitting Regulations 20
- Section 157 Environmental Protection Act 1990

5. Criminal Penalties

- (a) Magistrates

Most prosecutions are brought in the Magistrates' Court. Magistrates may

- Impose a fine of up to £20,000 (or in the case of fly tipping up to £50,000)
- Send someone to prison for up to 6 months

- (b) Crown Court

More serious cases are prosecuted in the Crown Court. On conviction the Crown Court may

- Impose an unlimited fine
- Send someone to prison for up to 2 years

- (c) In addition the court may serve a notice under regulation 57 requiring remedial works to be undertaken at the offender's expense where an offence has resulted in environmental damage.

PART IV. CIVIL LIABILITY

1. Where pollution results in personal injury, property damage or economic loss it may be possible to bring an action for damages - most usually for the torts of negligence and nuisance.

2. Negligence

(a) Negligence here means that the operator of the activity which caused the damage has failed to reach the standard of care which would be expected of a reasonable operator of that process, taking into account factors such as

- the seriousness of the harm which could be caused if care is not exercised
- how easy and practical it would be to take precautions to avoid damage
- general or common practice
- whether the defendant had some extra skill which should have been exercised

(b) The claimant will have to prove that it was the operator's action which caused the injury or damage and that it was a foreseeable type of injury or damage.

2. Nuisance

(a) Nuisance is concerned with preventing one person using his land in a way which causes another to suffer substantial and unreasonable interference with enjoyment of his land

(b) What is unreasonable will depend on a number of factors, such as

- The length of time the problem has continued
- The nature of the locality
- Whether the operator has some official consent
- Whether the activity would be a problem for ordinary people or only for some sensitive user

3. Recent years have seen an increasing number of environmental actions

- *Corby Group Litigation v Corby DC* [2009] EWHC 1944 (TCC)
- Action for damages by business affected by Buncefield fire
- *Margeson and Hancock v J W Roberts* [1996] Env LR 304

However the judiciary has proved resistant to attempts to broaden the substantive rules of common law actions to make them a more useful remedy for environmental damage.

Hunter v Canary Wharf [1997] 2 WLR 684

Cambridge Water v Eastern Counties Leather [1994] 2 AC 264

PART V. REMEDIATION OF CONTAMINATED LAND

1. In 1995 a new statutory mechanism for securing the remediation of contaminated land was introduced. This added a new section to the Environmental Protection Act 1990.

2. Under Part IIA of the 1990 Act a remediation notice requiring clean up of the land may be served on

(a) The person who caused or knowingly permitted the contaminants to be present on the land.

(b) If no person cannot be found/no longer exists, the current owner or occupier of the land becomes liable for remediation works – but is only liable to clean up their own piece of land